



# Aboriginal and Torres Strait Islander cultural rights in international law

Aboriginal and Torres Strait Islander people hold distinct human rights under international law.

## What is international human rights law?

International law defines the legal responsibilities of nation-states:

- in their conduct with one another
- and their treatment of individuals within their boundaries.

International law is established by customary practice or treaty. The United Nations (UN) oversees the development and compliance of international law, often through treaty bodies set up under individual treaties.

International human rights treaties – also known as conventions or covenants – are an agreed set of human rights standards and establish mechanisms to monitor the way treaties are implemented.

By ratifying a treaty, a nation agrees to be bound as a state party under international law.

There are seven main international covenants:

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Convention on the Elimination of all forms of Racial Discrimination (ICERD)

- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- Convention on the Rights of the Child (CRC)
- Covenant against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Convention on the Rights of Persons with Disabilities (CRD).

## What does this mean for Australia and the ACT?

The Constitution allows the Australian Government to enter into treaties. Australia has voluntarily accepted legal obligations under international law by ratifying the seven main UN human rights treaties.<sup>1</sup>

However, these obligations can only be enforced in Australia if there are specific Australian laws which cover the rights guaranteed by these treaties.

While Australia has no national charter of rights protecting the rights of Australian citizens, the rights set out in the main international covenants must be considered by Australian Government when it is developing new laws.

Australian courts can also look at international law and decisions, when they make decisions. Where the law is unclear, the courts will normally interpret it in a way that is consistent with Australia's obligations under international conventions.<sup>2</sup>

<sup>1</sup> Section 51(xxix)

<sup>2</sup> <http://classic.austlii.edu.au/au/journals/AUJIHRights/1995/10.html>

Australian states also have the power to make laws covering issues that affect states. For example, the *Human Rights Act 2004* (HRA) enacts a range of international human rights into the law of the Australian Capital Territory (ACT).

### **Aboriginal cultural rights protected by international treaty obligations**

Aboriginal cultural rights are protected by international treaty obligations. The HRA also expressly recognises the unique and distinct cultural rights of Aboriginal and Torres Strait Islander peoples in section 27(2).

There are other rights that are held by all of the community and recognised under the HRA:

- criminal process rights
- rights to privacy
- rights to education
- protection of family and children
- freedom of movement and religious belief
- general rights to equality, non-discrimination and equal recognition before the law.

The HRA imposes a duty on ACT public authorities — for example, ministers, government agencies and ACT Policing — to act consistently with human rights, and to give proper consideration to human rights when making decisions.

Authorities are also obligated to interpret laws in a way that is consistent with human rights, where possible. The HRA makes it clear that international law and the judgments of domestic, foreign and international courts and tribunals can be considered in interpreting laws here in the ACT.

Other ACT laws, such as the *Discrimination Act 1991*, also protect against discrimination on the grounds of race, family or kinship responsibilities, and where people live and work.

### **What does international human rights law say about Aboriginal cultural rights?**

Cultural rights are recognised in international human rights conventions and declarations and their interpretation is assisted by General Comments made by treaty bodies.

The following international legal instruments, which Australia has ratified or endorsed are relevant to cultural rights:

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- United Nations Declaration on the Rights of Indigenous Peoples
- International Covenant on Economic, Social and Cultural Rights

### **Universal Declaration of Human Rights (UDHR)**

The UDHR was adopted by the UN General Assembly on 10 December 1948.

The UDHR declares that human rights are universal and are to be enjoyed by all people. This includes civil and political rights, such as the right to life, liberty and free speech. It also includes economic, social and cultural rights, such as the rights to social security, health and education.

The UDHR is important because it inspired a range of other international covenants, which are legally binding on the states parties that ratify them.

While the UDHR is not a treaty it has binding legal status under customary international law.

## International Covenant on Civil and Political Rights (ICCPR)

The ICCPR came into force in 1976 and Australia agreed to be bound by it in 1980, subject to certain reservations.

The ICCPR commits states parties to protecting and respecting the civil and political rights of people, including:

- the right to life
- freedom of religion
- freedom of speech
- freedom of assembly
- electoral rights
- rights to due process and a fair trial.

The Australian Human Rights Commission can investigate complaints about the Australian government breaching these rights. If a person has exhausted all avenues for redress under Australian law, they can then complain to the relevant United Nations treaty body committee.

For more information about making a human rights complaint see the [ACT Law Handbook](#).

### Article 27 of the ICCPR

*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

Section 27(1) of the HRA is based on article 27 of the ICCPR and on decisions of the UN Human Rights Committee. It applies to all members of distinct cultural groups in the ACT.

The UN Human Rights Committee says that article 27 also protects the cultural rights of Indigenous peoples:

*The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.*

(UN Human Rights Committee General Comment No 23)

## United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

UNDRIP is an international declaration that seeks to restore relationships between Indigenous peoples and governments.

UNDRIP sets out the minimum standards for the survival, dignity, security and wellbeing of Indigenous peoples, both as individuals and communities.

In 2009 Australia gave its formal support to UNDRIP and committed to undertake initiatives consistent with the human rights standards contained in the declaration.

Section 27(2) of the HRA was modelled on articles 25 and 31 of UNDRIP.

### Article 25 of the UNDRIP

*Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.*

### Article 31 of the UNDRIP

*Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*

UNDRIP also contains the right for Indigenous peoples to determine their identity or membership.

### Article 33(1) of the UNDRIP

*Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not affect the right of indigenous people to be citizens in the states in which they live.*

Although UNDRIP is not a formally binding treaty it “reflects a global consensus on Indigenous peoples’ rights”<sup>3</sup> and guides the Australian Government in its interaction with Aboriginal and Torres Strait Islander people.

<sup>3</sup> OHCHR Fact Sheet 9 – Indigenous peoples and the United Nations Human Rights System

### International Covenant on Economic, Social and Cultural Rights (ICESCR)

Australia agreed to be bound by the ICESCR in 1975.

The ICESCR commits its parties to respecting and protecting economic, social and cultural rights including the right to an adequate standard of living, the right to education, the right to fair wages and the right to safe working conditions.

### Article 15 of the ICESCR

- 1. The States Parties to the present Covenant recognize the right of everyone: (a) to take part in cultural life*
- 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*

According to the UN Committee on Economic, Social and Cultural Rights:

*culture is a broad, inclusive concept encompassing all manifestations of human existence. The expression ‘cultural life’ is an explicit reference to culture as a living process, historical dynamic and evolving, with a past, present and a future.*<sup>4</sup>

This broad interpretation in the Committee’s General comment of culture and cultural life provides guidance in interpreting Aboriginal cultural rights in section 27(2) of the HRA and in accordance with international law standards.

<sup>4</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No 21, 2009

## Remember

- International law defines the legal responsibilities of nation-states in their conduct with one another and their treatment of individuals within their boundaries.
- International law does not have direct effect, until the Australian Government agrees to be bound by the international rule and creates domestic legislation to enforce these rights.
- By enacting the HRA, the ACT complies with some of Australia's international obligations in the ACT jurisdiction.
- Aboriginal cultural rights are protected under section 27(2) of the HRA.
- Section 27 of the Act is based on article 27 of the ICCPR and articles 25 and 31 of UNDRIP.
- Interpretations of article 15 of the International Covenant on Economic, Social and Cultural Rights provide guidance on the meaning of 'culture' and 'cultural life' Ibid.

## More about Aboriginal cultural rights

[www.hrc.act.gov.au](http://www.hrc.act.gov.au)

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